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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Implementation of Section 302 of The Telecommunications Act of 1996	)	CS Docket No. 96-46
OPEN VIDEO SYSTEMS	)	

REPLY COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

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SUMMARY

The comments of all of the parties who seek to bring new video competition to the marketplace through Open Video Systems ("OVS") overwhelmingly agree with the 1996 Act[1/] and the Commission's tentative conclusion in implementing the OVS requirements enacted therein, that the marketplace, and not the government, is the most appropriate means of regulating the service. MFS therefore urges the Commission to remain committed to the tentative conclusions expressed in the Notice of Proposed Rulemaking ("NPRM"), to allow market forces to be the primary "regulator" of OVS, moderated by the Commission's exercise of its complaint jurisdiction. The Commission was correct that OVS operators, as "new entrants" in the video marketplace, will be faced with vigorous competition from the established provider such that the marketplace can be relied upon to assure that there is no abuse of market power that requires strict Commission regulation of all OVS operators.

Moreover, even if the Commission were to conclude that the market power possessed by incumbent LECs as the dominant local exchange carriers requires some limitations on their OVS operations, it clearly does not need to impose any such regulation on a company like MFS that is a "new entrant" in *both* the local exchange *and* video markets. For all OVS operators, and especially companies such as MFS, to become viable competitors in this market, the Commission must devise regulations that provide such companies with the maximum flexibility to design their video business around the demands of the marketplace.

1/ The Telecommunications Act of 1996, 47 U.S.C § 153, *et seq.* ("1996 Act").

Specifically, MFS urges the Commission to adopt rules that take into account the market realities discussed below.

- **Carriage Rates, Terms and Conditions Will Be Controlled by Competition**

MFS urges the Commission to rely on market forces to ensure that reasonable rates, terms and conditions are negotiated between the parties. Several commenting parties, particularly the incumbent cable franchisees, suggest that detailed regulations and publication of rates is necessary to ensure their reasonableness. The comments, and the Commission's own experience in other areas of the communications marketplace, overwhelmingly demonstrate that this is not the case.

- **Channel Allocation and Location Should be Negotiated Between The OVS Operator, Programmers, and Where Appropriate, Local Franchising Authorities**

Several parties have proposed elaborate measures to prevent OVS operators from controlling the allocation and distribution of channels among programmers. In their zeal to "protect" consumers, however, these parties would have the Commission develop rigid formulas and procedures which would irreparably constrain the development of the very innovative distribution networks and vigorous market-driven competition that Congress sought in providing for OVS. Moreover, they ignore that the competition in the market provided by the incumbent cable operator, and hopefully competitive OVS operators, will be more than sufficient to guard against the parade of horribles that these commenters predict.

- **OVS Operator Certificates of Compliance Should be Approved if Facially Proper**

MFS agrees with parties that urge the Commission not to establish time-consuming and burdensome entry requirements for OVS operators and instead to adhere to the mandate of Congress by limiting its review of OVS certifications to a determination of whether they are facially proper and complete. Anything more would be virtually impossible in the ten day period allowed by Congress. Furthermore, the submission of the certification of compliance and all of the necessary identifying information will be sufficient to (1) enable the Commission to exercising its complaint jurisdiction, (2) allow local authorities to pursue consumer complaints and (3) notify programmers of the availability of OVS capacity.

- **OVS Operators Should not be Required to Carry the Programming of Competing Cable Franchisees**

The Commission should permit OVS operators to deny carriage to competition cable operators and their programming affiliates. Not surprisingly, the only parties that failed to realize the anti-competitive effects of forcing OVS operators to carry the programming of competitors are the cable franchisees themselves. Requiring OVS operators to carry their competitor's programming will mitigate against one of the primary goals of the Commission -- increased development of communications infrastructure.

- **The Local Francising Authorities must not be allowed to Impede the entry of LECs into the video programming market**

Congress and the Commission have made it clear that the OVS operators are exempt from local franchise obligations. MFS urges the Commission to reiterate this exemption in its

regulations, and to outline the role of local entities with specificity to prevent obstruction of the development of competition and compliance with the requirements of the 1996 Act.

- **The Commission Should Not Engage in the Micro-Management of OVS Suggested by Several Parties**

The Commission's challenge in developing its OVS rules will be to allow carriers the "broad flexibility" envisioned by Congress to develop OVS networks and services which justify investment in "transmission infrastructure and technology." This can only be accomplished by limiting its regulation to implementation of the broad statutory requirements without imposing some of the overly specific rules proposed by some parties, such as rate formulas, procedures that "guarantee" access, and rules establishing an "open, verifiable and prospective" process for allocating and distributing channels. These rules are likely to favor one OVS configuration over another and thus would have the exact result that Congress hoped to avoid by eliminating VDT -- the market would be forced to develop in accordance with the predictions of regulators rather than the demand of consumers.

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REPLY COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

MFS Communications Company, Inc. ("MFS"), pursuant to the Commission's Report and Order and Notice of Proposed Rulemaking in the above-referenced proceeding,[1/] hereby submits its Reply Comments. As the comments overwhelmingly demonstrate, all of the parties who seek to bring new video competition to the marketplace through Open Video Systems ("OVS") agree with the 1996 Act[2/] and the Commission's tentative conclusion in implementing

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1/ *In re Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems* and *In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 87-266 (Terminated) and CS Docket No. 96-46, FCC 96-99 (released Mar. 11, 1996) ("*NPRM*" or "*Notice*").

2/ The Telecommunications Act of 1996, 47 U.S.C § 153, *et seq.* ("1996 Act").

the OVS requirements enacted therein, that the marketplace, and not the government, is the most appropriate means of regulating the service. Indeed, these parties agree with MFS that unnecessary regulation, or regulation which envisions a preconceived structure for how OVS systems will develop in the marketplace, would affirmatively stifle the development of new and innovative means of delivering video programming to the public and thereby achieving Congress' goal of bringing additional competition to this segment of the communications market.

As Congress,[3/] the Commission,[4/] and several parties[5/] have noted, OVS operators will be new entrants in the multi-channel video distribution market which, aside from isolated instances of wireless delivery systems, has been almost entirely the province of a single provider in every market.[6/] As a result, even though many (but not all) OVS providers have significant shares of

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3/ Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 (Feb. 1, 1996) ("Conference Report").

4/ *NPRM* at ¶ 29 ("Open video operators generally will be 'new entrants' in established video programming distribution markets, lacking market power vis-a-vis video programming end users.").

5/ *See, e.g., Comments of the Motion Picture Association of America* ("MPAA") at 3-4; *Comments of Bell Atlantic, et* al at 9-10; *Comments of Viacom* at 3; *Comments of NYNEX* at 22; *Comments of the Alliance for Public Technology* at 7-8; *Comments of Access 2000* at 3. (A number of the comments filed on or before April 1, 1996 were filed on behalf of multiple entities. In the interest of brevity, all such comments are referred to herein as "*Comments of [first party listed as participating in the comments].*"

6/ MFS notes that a number of parties, primarily municipal franchisors, argue that incumbent cable operators should not be permitted to transform their existing cable systems into OVS platforms. *See, e.g., Comments of Tandy Corp.* at 2; *Comments of the Division of Ratepayer Advocate, State of New Jersey* at 2; *Comments of the City and County of Denver* at 7-8. MFS does not take a position with respect to this issue, but notes that, should a cable operator (continued...)

the local telephone marketplace, they will nevertheless be entering a new market dominated by an incumbent provider. Just as the Commission has wisely subjected the new telephone ventures of incumbent cable operators to streamlined regulation as non-dominant carriers despite their cable monopoly, so too should it refrain from yielding to the arguments raised by the cable industry that such streamlined regulation is inappropriate for new entrants (and therefore new competitors) into the video marketplace.[7/] Moreover, as all parties must concede, even if the Commission finds that any legitimate concerns have been raised regarding the entrance of the incumbent local exchange carriers ("LECs") into the OVS market which require regulation, such concerns plainly do not apply to a competitive LEC ("CLEC") such as MFS, which is a new entrant into both the telephone and cable markets.

I. THE 1996 ACT CLEARLY PRECLUDES THE EXTENSIVE REGULATION PROPOSED BY SOME COMMENTORS

Congress has exempted OVS operators from Title II obligations with respect to their OVS services, and has made it clear that the Commission must not impose any Title II-like

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[6/] (...continued)
be permitted to convert to an OVS configuration, it will not be a "new entrant" into the video marketplace (indeed, it is the "dominant carrier" in that market). Accordingly, such a conversion might raise concerns requiring additional regulatory oversight which are not raised with respect to new entrants.

[7/] *Conference Report* at 178 ("common carriers that deploy open video systems will be 'new entrants' in established markets *and deserve lighter regulatory burdens*. . . . the development of competition and the operation of market forces mean that government oversight and regulation *can and should be reduced.*") (emphasis added); *see also Comments of Viacom, Inc.* at ____ (the appeal of OVS "to LECs -- and other potential OVS operators -- will be determined in large measure by the manner in which the Commission implements this broad statutory model"); *Comments of U S West* at 21.

regulations on OVS operators and programmers.[8/] In addition, the Congress has given the Commission wide latitude to develop flexible rules which do not envision any single configuration or any single type of provider, but instead will allow both incumbent and new local exchange carriers to respond to the demands of the marketplace by developing innovative, cost-effective video distribution platforms "tailor[ed] . . . to meet the unique competitive and consumer needs of individual markets."[9/] Indeed, the Congress has provided that the Commission *must forbear* from imposing the provisions of the 1996 Act as to any service, carrier or class of carriers if it determines that enforcement is not necessary or in the public interest.[10/]

[8/] 1996 Act at § 656(a)(1)(c); *see also NPRM* at ¶ 5.

[9/] *Id.* at ¶ 2 (citing Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 177 (Feb. 1, 1996) ("Conference Report")).

[10/] 1996 Act, Section 401, to be codified as 47 U.S.C. § 159. With the exception of certain incumbent local exchange carrier interconnection obligations (§ 251(c)) and provisions regarding Bell operating company entry into interLATA services (§ 271), Section 401 of the Act, 47 U.S.C. § 10(a), provides that the Commission

> *shall* forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --
>
> > (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> >
> > (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> >
> > (3) forbearance from applying such provision or regulation is consistent with the public interest.

(continued...)

Nonetheless, several commentators have suggested that the Commission should impose certain rate and service regulations that mirror the very Title II provisions from which Congress has exempted OVS.[11/] Again, such proposals ignore, and are directly contrary to, Congress' appreciation of the fact that OVS operators are new entrants in the established video programming market and its mandate that, as such, the marketplace will appropriately dictate the standards of service and the rates they must meet.[12/] As the Commission has long-recognized with respect to the non-dominant new entrants in the long distance and local telephone market, and in other telecommunications markets where competition exists, Title II-type rate and entry regulation is (1) not necessary to protect consumers or to assure just and reasonable rates and (2) likely to impair the ability of OVS operators to compete effectively in the market by "stifl[ing] price competition and service and marketing innovation."[13/]

[10/] (...continued)
(emphasis added).

[11/] *See Comments of National Cable Television Association, Inc. ("NCTA")* at 18-20 (proposing the public filing of all rates prior to service); *Comments of Cablevision Systems Corp., et al*, at 20; *Comments of Tele-Communications, Inc. ("TCI")* at 14-15; *Comments of Home Box Office ("HBO")* at 21.

[12/] *Conference Report* at p. 178.

[13/] Policy and Rules Concerning Rates of Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) ("Competitive Carrier Proceedings"), *Second Report and Order*, 91 FCC 2d 59 (1982) ("Second Report"), *recon.*, 93 F.C.C.2d 54 (1983) ("Recon Order"); *Third Report and Order,* 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) ("Fourth Report"), *vacated, AT&T v. F.C.C.*, 978 F.2d 727 (D.C. Cir 1992), *rehearing en banc denied*, January 21, 1993; *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984), *recon.*, 59 Rad. Reg. 2d (P&F)543 (1985); *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), rev'd, *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186 (D.C. Cir. 1985)

A. Entry Regulation

Congress makes it clear that the Commission's "certification" of a new OVS operator should confirm a carrier's "intent to comply" with the statutory requirements for such systems.[14/] Further, the Act requires that the Commission approve or reject a carrier's certificate of compliance within 10 days. Despite the clear intent that this process should impose a minimal entry barrier, several parties nevertheless urge that the Commission ignore this clear directive and require a variety of "pre-certification" filings, all of which would impermissibly lengthen the entry process and impose unwarranted entry burdens on OVS operators.[15/] Adoption of these types of proposals by the Commission would in effect amount to re-imposition of the very Section 214 obligations that the Congress expressly abolished -- an effect which would be particularly inappropriate for non-dominant CLECs such as MFS who, prior to the 1996 Act, were not required to seek Section 214 approval to construct and operate telecommunications facilities.

In abolishing the Section 214 entry approval process which had been applied to dominant carrier video dialtone ("VDT") systems, the Congress clearly recognized that OVS operators will be "non-dominant" in the multi-channel video programming distribution ("MVPD")

14/ *Conference Report* at 177.

15/ *See e.g., Comments of the New York State Department of Public Service at 8; Joint Comments of Americable Entertainment, et al* at 6 ("A process for evaluating the justness and reasonableness of rates must be adopted before the systems are certified"); *Comments* TCI at 19-21 (asking Commission to adopt "meaningful" certification requirements); *Comments of Continental Cablevision* at 11-12 (arguing that cost allocation rules and a separate subsidiary must be in place prior to certification); *Comments of the* NCTA at 37; *Comments of the Association of Local Television Stations, Inc.* at 16-17.

marketplace, and that the regulatory entry process should accordingly be streamlined. Moreover, in imposing a 10-day limit on the Commission's review of OVS operator certificates of compliance, the Congress could not have stated more clearly its intent that the process not serve to delay or otherwise burden a carrier's entry. Accordingly, after a review of the various comments, MFS suggests that the required content of an OVS operator's certificate of compliance be limited to information that certifies the OVS operator's intent to comply with the provisions of the 1996 Act and such other information which will enable the Commission and other parties to know of the availability of the proposed system, the area(s) to be served, and a point of contact to whom communications from the Commission and other parties can be directed. Specifically, the rules should require OVS operators to submit:

- the legal name, mailing address, and state of incorporation of the OVS operator, as well as any assumed name under which it will do business in the community(ies) served;
- the name, mailing address and telephone number of the individual to whom communications from the Commission should be directed;
- the name, address and telephone number of the individual to be contacted in case of national or local emergencies so that the OVS operator, its affiliate, and/or its customer-programmers can carry vital information to their subscribers;
- the name of the community(ies) or area(s) to be served by the OVS network;
- the date the OVS network is scheduled to commence providing service; and
- the OVS operator's certification that the proposed OVS network will be operated in compliance with the Commission's rules and the 1996 Act (§ 653(a)(1)).

B. Rates, Terms and Conditions

As MFS stressed in its initial comments, Congress clearly intended to give OVS Operators the flexibility to design their systems around the needs of the market. This flexibility must extend to the freedom to contract for rates, terms and conditions on a case-by-case basis.[16/] The Commission recognized this need when it tentatively concluded that "there may be a number of viable options that would be consistent with the provisions of the 1996 Act concerning nondiscrimination and reasonableness of rates."[17/] The Commission is correct that OVS operators must have the flexibility to establish service offerings and pricing mechanisms which are both tailored to their own system configuration and customer needs, and are just, reasonable and non-discriminatory, is the "best way to encourage entry into the video marketplace through an open video system."[18/]

MFS notes that the reliance of Congress on the competitive market to regulate OVS, and its consequent decision to mandate streamlined regulation, is particularly well-founded with respect to non-dominant local telephone companies who are "new entrants," and do not have any market dominance, in either the cable television or the telephone markets and who, moreover, do not have existing cable or telephone ratepayer-financed networks. Such new carriers will need to compete head-to-head with both incumbent cable operators and local exchange carriers, many, if

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16/ *See NPRM* at ¶ 32 ("Congress intended that some level of rate discrimination would be acceptable"); *Comments of Access 2000* at 4-6; *Comments of Bell Atlantic, et al,* at 22-23; *Comments of the Association of America's Public Television Stations* at 3 (public stations should be given preferential rates and terms).

17/ *NPRM* at ¶ 31.

18/ *Id.* at ¶ 30.

not all,[19/] of whom will likely offer full video and telephone services to their *existing* subscribers. In comparison, new entrants will have to expend huge capital resources to construct networks and, at the same time, will have to market their services in such a way that they will provide innovative, competitively-priced, choices for subscribers and, in the case of OVS, customer programmers. Clearly, the "market incentives and the need to compete," *NPRM* at ¶ 1, which the Commission has already tentatively concluded exist and will assure just and reasonable negotiated rates charged by *all* OVS operators who must compete with an incumbent cable operator, are an even larger factor for new entrants who must compete with incumbents on *both* sides of the converging industry.

19/ MFS notes that OVS operators may or may not act as programmers, depending upon their own business plans and market demand. The Statute clearly contemplates that parties may act as operators only providing that "[a] local exchange carrier ***may*** provide cable service . . . through an open video system." 1996 Act at §653(a)(1). Consequently, if the Commission chooses to adopt the definition of Open Video Operator suggested by Bell Atlantic and its joint commentors, it should read:

> *Open Video system operator*. Any person or group of persons who provides cable service over an open video system, either directly, through an affiliate or through independent video programming providers owns a significant interest in such open video system.

Cf. Comments of Bell Atlantic et al., at Appendix p. 1.

C. Cost Allocation Issues

Several parties expressed concern regarding the possibility that, without Commission intervention through imposition of separate subsidiary requirements,[20] cost allocation rules,[21] limitations on joint marketing,[22] and the like, OVS operators could behave in an anti-competitive way by allocating their costs in such a way that their telephone ratepayers would subsidize the OVS business and could leverage their local telephone market dominance to gain unfair advantages in the video market.[23] At the risk of belaboring the obvious, all of these concerns pertain only to an incumbent LEC which, by virtue of its incumbent position in the local telephone market, controls to some extent the timing and terms of competitive entry into that market and has a rate base from which any cross-subsidy could be taken. MFS will leave it to the incumbent LECs to argue whether these concerns are sufficient to warrant intervention by the Commission. It urges, however, that the Commission must exercise its mandate to forbear from

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[20] *See Comments of NCTA* at 25-27; *Comments of Continental Cablevision* at 12; *Comments of TCI* at 15.

[21] *Comments of American Cable Entertainment, et al* at 6; *Comments of NCTA* at 21-23 (determination pursuant to Part 64 Joint Cost rules must be made before LECs can enter OVS market); *Comments of Cablevision Systems Corp.* at 25-30; *Comments of TCI* at 3-7.

[22] *Comments of NCTA* at 24-25; *Comments of Continental Cablevision* at 15; *Comments of Cox Communications, Inc.* at 8.

[23] *Comments of the General Services Administration* at 3-5; *Comments of Continental Cablevision* at 11-12; *Comments of AT&T Corp.* at 2; *Comments of MCI* at 2; *Comments of Comcast Cable Communications, et al*, at 7; *Comments of Cox Communications, Inc.* at 5-8.

including any new local telephone companies such as MFS from the application of any rules it might develop in this regard.[24/]

D. Dispute Resolution

MFS agrees with the Commission and many of the commenting parties that specific procedures should be set up to resolve disputes arising between Operators and programmers. These procedures and the governing legal standard, as the California Public Utilities Commission ("CPUC") noted, must neither set so low a threshold that it encourages the excessive filing of complaints nor so should it be so stringent that "persons with legitimate complaints are discouraged from seeking redress."[25/] MFS agrees that the Commission must be very wary of the dispute resolution process being used as a delaying tactic by incumbent competitors seeking to hold their market share as long as possible. Therefore, we support suggestions such as the CPUC's that would require clear and convincing evidence of discrimination,[26/] or the proposal of Bell Atlantic and its the other LECs with which it filed comments that would require

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[24/] For example, it would be absurd to limit joint marketing by companies such as MFS that have no dominant position to exploit in either market. Thus such rules, if adopted should only apply to carriers that are dominant in one market -- telephone or video. Furthermore, if the Commission adopts such rules, they must be reciprocal, meaning that if LECs are prohibited from joint marketing telephone and cable services, cable companies must face the same limitation.

[25/] *Comments of the People of the State of California and the Public Utilities Commission of the State of California*, at 9.

[26/] *Id.* at 10. MFS also supports the proposals by the CPUC that would require dispute resolution procedures to be established providing "(1) a progression from mediation to arbitration; and (2) a limitation on involvement by parties not directly involved in the dispute." *Id.* at 14. Both suggestions could simplify and reduce the time necessary to consider such claims.

complainants to show: "(1) that the operator intentionally treated it substantially differently from other similarly situated video programing providers, including the operator or its affiliates, (2) that such discriminatory treatment was commercially unreasonable, and (3) that such discriminatory treatment caused . . . substantial harm."[27/]

Of course, the Commission will likely be required to define certain terms and clarify the statutory provisions somewhat in order to facilitate these proceedings. For example, the Commission and many commentors have recognized that it would be unfair to allow a single unaffiliated programmer to demand so many channels that capacity is exceeded through their request alone. This could have the inequitable result that the operator would be limited to one third of the system and the unaffiliated programmer would be able to select two-thirds. In the NPRM, the Commission suggested that affiliated programmers should not be limited to selection of one-third of the channels of the system if there is only one other programmer.[28/] Furthermore, the Commission should specify how it will determine when demand has exceeded capacity. As MFS and several other parties noted in their initial comments, the terms demand and capacity must be defined to reflect the reality of the market, meaning: (1) that demand must be demonstrated as "real" through good faith showings such as deposits and (2) capacity must

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27/ *Comments of Bell Atlantic, et al.*, at Appendix p. 09.

28/ NPRM at ¶ 20; *see also*, Comments of the City of Seattle at 3 (when there is only one unaffiliated programmer the operator/affiliated programmer should be allowed to select 50% of the channels).

include all reasonable capacity including that which can be built within a reasonable period of time.[29/]

II. THE COMMISSION MUST CLARIFY THAT LOCAL FRANCHISING AUTHORITIES MAY NOT IMPOSE OBLIGATIONS ON OVS OPERATORS WHICH IMPEDE ENTRY

Most of the comments filed by local franchise authorities correctly recognize that Congress expressly exempted OVS operators from local franchise obligations, and seek only to assure that they will have a role in developing a workable means for OVS operators to comply with the statutory requirement that OVS operators be subject to obligations that are no greater or lesser than the obligations contained in Section 611 of the Communications Act. Among the comments, however, are several instances which indicate a significant misunderstanding concerning the extent to which local authorities are permitted to regulate OVS operators. To preclude unnecessary debate and possible litigation in the future as OVS networks are deployed, MFS urges that the Commission take this opportunity to specify clearly that the local authorities may not, under the Act, establish regulations or requirements which impede the entry of OVS

[29/] *Comments of MFS Communications Company, Inc., at 20; Comments of Bell Atlantic, et al.,* at Appendix p. 03 (MFS would add the following note to the section entitled "Carriage on open video systems" at subsection (a):

> Demand will not be considered to be in excess of capacity unless demand exceeds both the capacity that is in place at the time of the programmer's request and the capacity that can be constructed within a reasonable period of time.

operators or which, other than in the instances specifically enumerated in the 1996 Act, seek to regulate OVS operators in the same way as the cable operators.[30/]

For example, while most of the local authorities who commented envisioned that OVS operators will comply with their obligation to assure that PEG channels are available on their networks by interconnecting with the existing PEG channels,[31/] others suggest that local authorities should be permitted to require that an OVS operator instead establish a parallel set of of PEG channels.[32/] The Commission should preclude any such economically wasteful, duplicative requirements. Instead, just as it has done in the local telephone context, where construction of duplicative network facilities is not economic and, indeed, would be a barrier to competitive entry, the Commission should provide that OVS operators may interconnect with existing PEG channel feeds so that they may comply with the 1996 Act by making such programs available on its OVS platform for programmers to deliver to their subscribers. It is MFS' understanding that the costs of maintaining such facilities is typically collected as part of

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30/ The comments of some of the municipalities seem to ignore the fact that the Congress has exempted OVS operators from franchise rules. 1996 Act at § 653(c)(1)(B) *but see, e.g., Comments of Olathe, Kansas* at 4-10; *Comments of Arvada* at 2.

31/ *Comments of Greater Metro Cable Consortium* at 2; *Comments of NYNEX* at 17; *Comments of the Division of Ratepayer Advocates, State of New Jersey* at 10; *Comments of the City of Seattle* at 1; *Comments of the City of Indianapolis* at 4; *Comments of the Minnesota Political Subdivisions* at 9; *Comments of Bell Atlantic* at 27 ("Section 611 requires only that capacity be made available for PEG access").

32/ *Comments of NCTA* at 33-34 ("Unless voluntary interconnection agreements are reached between the parties, the OVS programmers will have to deliver PEG access independently"); *Comments of Cablevision Systems Corp.* at 22; *Comments of TCI* at 17-18; *Comments of the Named Political Subdivisions of Minnesota* ("the Minnesota Subdivisions") at 6-12; *Comments of the City of Arvada* at 1.

the cable franchise fee. To the extent that the franchising authority elects to charge OVS operators a comparable fee based on its OVS revenues pursuant to 47 U.S.C. § 573(c)(2), a *pro rata* contribution to the cost of such facilities will be recovered.

III. THE MICRO-MANAGEMENT ENVISIONED BY THE CABLE INDUSTRY AS APPROPRIATE REGULATION FOR OVS SYSTEMS WILL STYMIE THE DEVELOPMENT OF INNOVATIVE OVS NETWORKS

In its initial Comments, MFS strongly urged that the Commission's regulations not attempt to micro-manage the implementation of OVS or impose regulations which specifically envision any particular type of network configuration or platform. As it noted therein, it is critical to the development of competitive OVS networks that the Commission implement the provisions of the 1996 Act in a way that allows local exchange carriers, and particularly new local competitors such as MFS, sufficient flexibility to develop demand-driven products and services that are compatible with their networks and that therefore sustain infrastructure and technology investment. Only by doing so will the goal of Congress to "encourage telephone company entry and spur competition and new investment" be realized. It will be critical to such development for all local telephone companies -- incumbent and new -- to have broad flexibility to determine where and how to construct and operate OVS platforms in response to their own individual assessment of demand and their own creativity in developing a platform structure to accommodate it. That analysis will also need to be based in part on each operator's technical network configuration, capacity, and location. Given the vastly different networks of incumbent local exchange carriers and new entrants like MFS, a different OVS platform configuration is inevitable -- and indeed desirable. The Commission's challenge, therefore, is to develop rules

which allow carriers the "broad flexibility" to develop OVS networks which justify the investment in "transmission infrastructure and technology" to bring the desired competition to the market, and which also conform to the obligations set forth in the 1996 Act.[33/]

The restrictions and burdens which cable industry commenters seek to impose on OVS operations are antithetical to this goal. Indeed, in their zeal to assure that the marketplace is "protected," and in the absence of any knowledge whatsoever as to the possible future network configurations and cost structures of OVS networks, these parties seek to have the Commission develop rigid formulas for determining whether particular rates are just and reasonable,[34/] specific procedures to "guarantee" non-discriminatory access,[35/] require appointment of an independent "channel administrator,"[36/] establish an "open, verifiable and *prospective*" process for selecting programmers and channel allocation,[37/] and require that rates be established in the same way as leased access channels from the cable company.[38/]

33/ *See NPRM* at ¶¶ 2 and 4.

34/ *Comments of American Cable Entertainment, et al*, at 6; *Comments of MCI* at 6-9.

35/ *Comments of NCTA* at 3; *Comments of Cablevision Systems Corp.* at 14-17.

36/ *Comments of NCTA* at 8-15; *Comments of American Cable Entertainment* at 8-13.

37/ *Comments of Cablevision Systems Corp.* at 8 (emphasis added); *Comments of TCI* at 13-14.

38/ *Comments of Continental Cablevision* at 7-9; *Comments of Cable Telecommunications Association* ("CATA") at 3-4; *Comments of NCTA* at 20.

Clearly these suggestions are directly contrary to the mandate which Congress sent to the Commission. To try to develop formulas and standards, based on video dialtone ("VDT") models, for determining with respect to new and innovative OVS networks, what would constitute an unjust or unreasonable rate, term or condition would unquestionably circumscribe and hamstring the ability of new entrants to develop new service offerings and therefore artificially restrain the benefits of a truly competitive marketplace.[39/] Learning from the experience of VDT, the Congress has now clearly indicated its intent for a streamlined, deregulated approach to OVS (and, indeed, to the communications industry generally) and has given the Commission the statutory tools to implement that approach. To construct specific rules and regulations regarding rates, terms, and conditions which will be appropriate for all of the network configurations and contractual arrangements which might be developed by OVS operators is an impossible task. Any attempt to do so, especially in the case of non-dominant carriers, would necessarily circumscribe the development of new products and services, and consequently would have precisely the result which the Congress plainly sought to avoid -- marketplace development dictated by the predictions of regulators, and not driven by the market itself. Instead, therefore, the Commission should permit "[m]arket forces, together with [its] power to intervene in appropriate cases,"[40/] either on its own motion (should it believe that the

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[39/] *See Comments of NYNEX* at 22 ("to be competitive, OVS operators will have to offer a diverse programming array and a different mix than that afforded by the cable operator"); *Comments of Bell Atlantic* at 5-6.

[40/] *Competitive Carrier Second Report* at ¶ 24.

market in general is not working as expected) or in response to specific complaints, to be the principle under which the Commission permits the market to develop.[41/]

IV. CONCLUSION

For the foregoing reasons, MFS urges the Commission to adopt rules which will permit OVS operators the broadest possible flexibility within the scope of the 1996 Act to design and implement OVS networks. MFS encourages the Commission not to adopt any regulation that can only be applied to a single type of OVS system, and that it confirm explicitly that it intends by its rules to promote the development of OVS systems and infrastructure by all local exchange carriers, including non-dominant carriers.

Respectfully submitted,

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41/ *See Comments of NYNEX* at 5.